92-1480

SUPREME COURT, U.S.
FILED
MAR 8 1993
OFFICE OF THE CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term 1992

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

-vs-

RUDOLPH DOMAIAR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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Of Counsel

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QUESTION PRESENTED

SINCE AN "ACQUITTAL" AT THE TIME OF THE ADOPTION OF THE DOUBLE JEOPARDY CLAUSE MEANT ONLY A JURY VERDICT, AND THE GRANT OF A DIRECTED VERDICT OF NOT GUILTY WAS THEN UNKNOWN, SHOULD SMALIS V PENNSYLVANIA BE OVERRULED, TO PERMIT THE STATE TO APPEAL AN ERRONEOUS GRANT OF A MOTION FOR DIRECTED VERDICT AND TO THUS HAVE ONE FULL AND FAIR OPPORTUNITY FOR A VERDICT IN THE CASE, AT LEAST WHERE THE ERROR IN DIRECTING A VERDICT WAS A MATTER OF LAW?

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No. _____

In The

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PEOPLE OF THE STATE OF MICHIGAN,

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RUDOLPH DOMAIAR,

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PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

NOW COME the People of the State of Michigan, by the Prosecuting Attorney for the County of Kent (Timothy K. McMorrow, Chief Appellate Attorney), and pray that a writ of certiorari issue to review the judgment of the Michigan Court of Appeals

entered September 30, 1992, dismissing a prosecution appeal on the basis of double jeopardy. The Michigan Supreme Court denied a timely application for leave to appeal on December 30, 1992.

OPINIONS BELOW

The trial court's order (Appendix A) is unpublished. The Michigan Court of Appeals order (Appendix B) is unpublished. The order of the Michigan Supreme Court (Appendix C) is unreported at this time, but will be published, 441 Mich ___ (1992).

STATEMENT OF JURISDICTION

The Judgment of the Michigan Court of Appeals was entered on September 30, 1992. The order of the Michigan Supreme Court was entered on December 30, 1992. The jurisdiction of this Court is invoked under 28 USC sec. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

"No person shall be . . . subject for the same offense to be twice put in jeopardy of life and limb.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondent was charged with two counts of attempted child enticement, MCL 750.350; MSA 28.582; MCL 750.92; MSA 28.287. He was also charged as a second felony offender, pursuant to MCL 769.10; MSA 28.1082, based on a prior felony conviction of breaking and entering.

Evidence presented at trial showed that respondent approached two young girls, both 8 years old, in his car, drove around the block, drove up to the girls, and asked if they wanted to go for a ride. (T1, pp 59, 87-88)[1] The car was right in front of them when respondent did this. (T1, pp 61-87) This was not the first

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[1]Factual references are to the trial transcript. "T1" refers to the first day of trial, and "T2" to the second day of trial. All references to the holdings and orders of the trial court, Michigan Court of Appeals, and Michigan Supreme Court shall be to the appendix.

time they had seen this car. (T1, p 87) The next day, respondent drove by them slowly. (T1, pp 65-66, 89) The mother of one of the children saw respondent this day in his car. (T1, p 103)

Respondent told a police officer who interviewed him that he asked the children to get into his car and that, had the children gotten into his car, he was going to rub their thighs and butts. (T2, p 17)

The trial court granted a directed verdict at the close of petitioner's case. The court found that what respondent did was not, as a matter of law, a sufficient overt act to constitute an attempt.

The evidence presented at trial was essentially the same evidence presented at preliminary examination. The defendant never moved in the trial court to dismiss on the basis that the evidence at the preliminary examination was insufficient,

a motion permitted by Michigan Court Rules, MCR 6.110(H).

REASONS FOR GRANTING THE WRIT

Petitioner asks this Court to overrule its prior authority holding that a trial court's directed verdict, removing the case from the jury's consideration, precludes retrial on double jeopardy grounds, United States v Martin Linen Supply, 430 US 564; 97 S Ct 1349; 51 L Ed 2d 642 (1977), even where the directed verdict has been granted on an erroneous interpretation of law, Smalis v Pennsylvania, 476 US 140, 144, n 7; 106 S Ct 1745; 90 L Ed 2d 116 (1986).

The Michigan Court of Appeals concluded that double jeopardy precluded Petitioner from appealing the trial court's grant of a motion for directed verdict. The Michigan Court of Appeals was undoubtedly correct under this Court's prior precedents. In Smalis v Pennsylvania, supra, 476 US at 144, this

Court said that under the Court's prior decisions, "which we are not inclined to reconsider at this time," a directed verdict was an acquittal. Petitioner respectfully submits that the time has come for this Court to reexamine its prior holdings, for neither the history of the double jeopardy clause nor logic nor common sense support the claim that a directed verdict, removing the case from the jury, is the same for double jeopardy purposes as a jury verdict.

As an initial matter, the decision of the Michigan Court of Appeals cannot be viewed as resting on state law. People v Cooke, 419 Mich 420; 355 NW2d 88 (1984), which the Court of Appeals cited in its order dismissing the appeal, held that double jeopardy precludes an appeal after the grant of an order for directed verdict. MCL 770.12; MSA 28.1109, amended

in 1988, after the Cooke decision, permits the prosecution to appeal by right from a final judge "if the protection against double jeopardy under section 15 of Article I of the state constitution of 1963 and Amendment V of the constitution of the United States would not bar further proceedings against the defendant." Neither Cooke nor the Michigan statute suggests that the Michigan double jeopardy provision should be read to preclude the prosecution's appeal under the present circumstances. The most reasonable explanation of the Michigan Court of Appeals order is that the Court of Appeals believed federal law required dismissal of the case. Michigan v Long, 463 US 1032, 1040-1041; 103 S Ct 3469; 77 L Ed 2d 1201 (1983). Thus, the issue of the application of the Fifth Amendment is properly presented in this case.

Blackstone's formulation of double jeopardy concerned a plea in bar, going not to the merits of the cause but "to the merits of the indictment," and giving "a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged." IV Commentaries, at 329. Blackstone identified four such pleas:

> "First, the plea of autrefois acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offense. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indict-ment, or other prosecution, he may plead such

acquittal in bar of any subsequent accusation for the same crime . . .

* * *

"Secondly, the plea of autrefois convict, or a former conviction for the same identical crime . . . is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime. . .

* * *

"Thirdly, the plea of autrefois attaint, or a former attainder; which is a good plea in bar, whether it be for the same or any other felony. For wherever a man is attainted of felony, by judgment of death either upon a verdict of confession, by outlawry, or

heretofore by abjuration . . . he may plead such attainder in bar to any subsequent indictment or appeal, for the same or for any other felony. And this [is] because, generally, such proceeding on a second prosecution cannot be to any purpose, for the prisoner is dead in law by the first attainder, his blood is already corrupted, and he hath forfeited all that he had . . . so that it is absurd and superfluous to endeavor to attaint him a second time. . . . And from these instances we may collect that the plea of autrefois attaint is never good, but when a second trial could be quite superfluous.

* * *

"Lastly, a pardon may be pleaded in bar . . . as at once destroying

> the end and purpose of the indictment, by remitting that punishment, which the prosecution is calculated to inflict. . . ."
>
> IV Commentaries, at 329-331.

Differences between 18th Century practice and modern practice renders some of this language obsolete -- autrefois attaint is no longer a consideration, since American courts reject the concept of "corruption of blood" -- but it is still vital to consider that Blackstone's concept of double jeopardy was in effect at the time of the drafting of the Double Jeopardy Clause. This Court has in modern times listed the essentials of the Double Jeopardy clause: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against

multiple punishments for the same offense." North Carolina v Pearce, 395 US 711, 717; 89 S Ct 2072; 23 L Ed 2d 656 (1969). But it must be stated that the acquittal which precludes reprosecution was originally an acquittal on the merits by the trier of fact.

Nothing in Blackstone indicates that double jeopardy applied to a power of a court to take a case away from the jury. Many jurisdictions did not even recognize the authority of a trial court to direct an acquittal, see State v Pascal, 147 La 634; 85 So 621 (1920); People v Zurek, 277 Ill 621; 115 NE 644 (1917). Others, including Michigan, accepted the validity of a directed verdict, but only as an instructional doctrine, the power of a court to instruct the jury to return a not guilty verdict. People v Eaton, 59 Mich 359; 26 NW 702 (1886). In fact, it

appears that the authority which developed was originally not an authority to remove the case from the jury, but rather only to instruct the jury that it had a duty to acquit. The jury still delivered the verdict, but it was not bound to acquit. See annotation, Power and Duty of Court to Direct or Advise Acquittal in Criminal Case for Insufficiency of Evidence, 17 ALR 910. This Court, to be sure, recognized the power of Federal Court to direct a verdict of acquittal, France v United States, 164 US 676, 681; 17 S Ct 219; 41 L Ed 597 (1896). But the eventual development of a theory which permitted a trial judge to remove a case from a jury for lack of evidence did not exist, in the same manner it exists today, at the time of the adoption of the Fifth Amendment.

In Kepner v United States, 195 US 100; 24 S Ct 797; 49 L Ed 114 (1904), this

Court considered the propriety of a law which permitted retrial after jury acquittal, where a reviewing court had found legal error which prevented the prosecution from providing a fair presentation of the evidence. The facts in Kepner were highly distinctive. It involved a trial in the Philippines, which had recently come under American jurisdiction. Under Spanish law, either side in a criminal case could appeal any aspect of a case, and the appellate courts could grant a new trial upon either party's appeal. A judgment was deemed "final" only when the "audencia," or local supreme court, had passed upon the case, and the matter had passed final review in the supreme court in Madrid. Spanish law had a double jeopardy provision, but it applied only after the first proceeding was concluded in its entirety, including

the appeal. The defendant in Kepner had his first acquittal reversed on appeal by the "audencia." On retrial, he was convicted and sentenced.

This Court held that the finality of a verdict of acquittal prevented the government from appealing an acquittal, even if there were express statutory authority permitting it. Justice Holmes, in dissent, wrote that "jeopardy" protected only against retrial following a final judgment, including an appellate judgment. Justice Holmes further noted that retrial was not barred after a mistrial, nor after reversal of a conviction for legal error. "If a statute should give the right to take exceptions to the government, I believe it would be impossible to maintain that the prisoner would be protected by the Constitution from being tried again. He no more would

be put in jeopardy a second time when retried because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm." Id, 195 US at 134-135.

Justice Holmes's opinion did not carry the day, and it is well established that an acquittal by the trier of fact precludes a second trial, even if erroneous factually or based on a misconception or misdirection of the law. But there is no logical or historical reason to preclude Justice Holmes's view in the case where the prosecution seeks not to reverse a verdict, but only seeks an opportunity for a verdict.

In Fong Foo v United States, 369 US 141; 82 S Ct 671; 7 L Ed 2d 629 (1962), the trial judge, after seven days of trial testimony, directed the jury to return a verdict of not guilty against a

corporation and two individual defendants, and then entered a formal judgment of acquittal. The trial judge's actions were based on alleged misconduct of the assistant United States Attorney and a lack of credibility of witnesses. The Court of Appeals held that the District Court had no power to grant the directed verdict. This Court, although agreeing that the "acquittal was based upon an egregiously erroneous foundation," held that the verdict of acquittal was "final and could not be reviewed." Id, 369 US at 143. But the Court's opinion contained no analysis of whether a "judgment of acquittal" entered or ordered by the trial judge, rather than reached by the jury through its own deliberations, falls within the protection of the double jeopardy clause. The Court appeared to simply assume that it did. The Court

cited for the proposition that double jeopardy precluded retrial United States v Ball, 163 US 662, 671; 16 S Ct 1192; 41 L Ed 300 (1896) -- but that case involved a clear jury acquittal, where the government attempted to reprosecute an acquitted defendant after his two codefendants had their murder convictions reversed on the grounds that the indictment was legally improper. This Court rejected the proposition that the first acquittal was a nullity. An actual finding by a trier of fact that a defendant is not guilty cannot be compared to a dismissal by a trial court which removes the case from the trier of fact.

In United States v Martin Linen Supply, 430 US 564; 97 S Ct 1349; 51 L Ed 2d 642 (1977), the Court held that once jeopardy attached, a court's factual resolution of any of the elements of the

charged offense would call into play the Double Jeopardy Clause, regardless of any trial court error. In Lee v United States, 432 US 23; 97 S Ct 2141; 53 L Ed 2d 80 (1977), the Court drew a distinction between a resolution of an issue on the factual merits and a dismissal on a defendant's motion for failure of an indictment to state an offense, and held that dismissal on the latter basis did not result in a "verdict," so that double jeopardy would not bar retrial. But in Sanabria v United States, 437 US 54; 98 S Ct 2170; 57 L Ed 2d 43 (1978), the Court, though recognizing the difference between a true acquittal on the merits and a dismissal "functionally equivalent to a mistrial," nevertheless held that even where a directed verdict stems from a trial judge's erroneous exclusion of evidence, it still barred retrial.

Most recently, in Smalis v Pennsylvania, 476 US 140; 106 S Ct 1745; 90 L Ed 2d 116 (1986), the Court held that a state trial court's ruling that the prosecution's evidence was insufficient to establish guilt was an acquittal barring retrial. The prosecution argued that the dismissal was based on an error of law, but the Court rejected this distinction.

The evolution of double jeopardy as applied to directed verdicts has thus reached a conclusion unsupported in the text or tradition of the Double Jeopardy Clause: that a judge's removal of a case from a jury is autrefois acquit, and that this action of law, depriving the trier of fact from even reaching a decision on the merits, amounts to double jeopardy.

What is particularly egregious about this in the instant case is that the defendant never made a challenge,

permissible under Michigan law, to the sufficiency of the evidence at preliminary examination. Had the defendant done so, it is apparent that he would have convinced the trial judge that no crime under Michigan law occurred, and would have obtained dismissal of the case. Petitioner could then have appealed that dismissal. We are confident that any such order would have been reversed by the Michigan Court of Appeals -- but that is neither the point nor this Court's concern. The point is that we have been deprived of an appeal on the basis of a dismissal, a removal of the case from the jury as a matter of law, without ever having had the opportunity to have a jury pass on the issue. Why is an appeal barred by a directed verdict, but not by dismissal on the identical legal theory when the motion to dismiss is brought

before trial? Should criminal defendants be encouraged not to make such pretrial motions, and instead hope that a ruling at the conclusion of the prosecution's case, even one based on an erroneous interpretation of the law, will bar any future proceedings? Such a legal theory is both inconsistent with the history of the Double Jeopardy Clause and poor policy.

We cannot, of course, point to any conflicts among state courts or federal circuits on this issue; this Court's decisions in Martin Linen Supply and Smalis v Pennsylvania preclude a conflict, since all courts must follow these cases. But, Petitioner submits, this Court has never carefully considered this issue, whether the prosecution's request only for the opportunity for a verdict from the jury is precluded by an erroneous

determination of a single trial judge, removing a case entirely from the jury's consideration. Since the history of the adoption of the Double Jeopardy Clause does not support a rule that a dismissal by the trial court, taking the case from the jury, is the same as a verdict of not guilty by the trier of fact, this Court should reconsider its prior precedents and hold that jeopardy does not preclude trial after an appellate court ruling that the grant of a motion for directed verdict, brought by the defendant, was error as a matter of law.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that this Court grant plenary review, reverse the order of the Michigan Court of Appeals, and hold that double jeopardy does not bar appeal from a grant of a directed verdict entered upon an erroneous interpretation of law.

Respectfully submitted,
William A. Forsyth
Prosecuting Attorney, Kent County, Michigan
Of Counsel

Timothy K. McMorrow
Chief Appellate Attorney
Counsel of Record

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APPENDIX A

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff

-vs-

RUDOLPH DOMAIAR,

Defendant.

Kent County Circuit
Court No. 91-55982-FH
Hon. Robert A. Benson

ORDER DISMISSING CASE

At a session of the Kent County Circuit Court held on August 7, 1992
Present: Hon. Robert A. Benson

This matter having been brought to trial by jury; David Schieber, Assistant Prosecuting Attorney, representing Plaintiff; James Milanowski representing Defendant; Plaintiff having presented its proofs, and the Defendant having moved for dismissal, and the Court having stated its opinion on the record that the evidence

presented as a matter of law did not constitute an attempt as alleged in the information,

IT IS HEREBY ORDERED, that the motion to dismiss is GRANTED.

/s/
Hon. Robert A. Benson
Circuit Court Judge

Examined, countersigned and
entered by me:

/s/ Marlene Gould
Deputy Clerk

Attest: A True Copy

/s/ Marlene Gould
Deputy Clerk

APPENDIX B

COURT OF APPEALS, STATE OF MICHIGAN

ORDER

PEOPLE OF MICHIGAN V RUDOLPH DOMAIAR

Martin M. Doctoroff
Presiding Judge

Docket #155270
L.C. #91-55982-FH

William B. Murphy
Myron H. Wahls
Judges

The Court, pursuant to MCR 7.216(A)(10) orders that the claim of appeal is DISMISSED for lack of jurisdiction because plaintiff-appellant is without authority to appeal where the protection against double jeopardy bars further proceedings against the defendant. MCL 770.12; MSA 28.1109; People v Cooke, 419 Mich 420 (1984).

A true copy entered and certified by Ella Williams, Chief Clerk, on

September 30, 1992

Ella Williams
Chief Clerk

APPENDIX C

ORDER
Entered: December 30, 1992

MICHIGAN SUPREME COURT
Lansing, Michigan

Michael F. Cavanagh
Chief Justice

Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SC: 95089
COA: 155270
RUDOLPH DOMAIAR, LC: 91-055982-FH

Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question

presented should be reviewed by this Court.

I CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 30, 1992

/s/ Jacqueline B. McKinnon, Deputy Clerk